IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20/08/2002

CORAM

THE HON'BLE MR. JUSTICE A.K. RAJAN

Crl.O.P.No.19430 of 2000
AND
Crl.O.P.Nos.22910 to 22912 of 2000

1. G.Hubert Fenelon
2. G.Nirmal Kumar
3. P.S.Venkatesan .. Petitioners in
all Crl.O.Ps.

-vs-

D.Sridharan .. Respondent in
Crl.O.P.19430 and
22910 of 2000

Mrs.Vijaya Sridharan .. Respondent in
Crl.O.P.22911 and
22912 of 2000

These petitions are filed to quash the proceedings in
C.C.No.3848 of 2000, 3846 of 2000, 3847 of 2000 and 3845 of 2000 respectively
on the file of V Metropolitan Magistrate, Chennai, as stated therein.

For Petitioner : Mr. K.Ramani

For Respondents : Mrs. Usha Raman
for M/s. G.R.Swaminathan.

:C O M M O N O R D E R

These four original petitions are filed to quash the proceedings in
C.C.No.3848 of 2000, 3846 of 2000, 3847 of 2000 and 3845 of 2000 respectively.

2. The petitioners state in their affidavits as follows: The
petitioners herein were directors of the Royapettah Benefit Fund Nidhi
Limited, (hereinafter referred to as "RBF Nidhi), a company incorporated under
the Companies Act. The petitioners were whole time FeeDirectors receiving
salary without any eligibility in respect of profits or dividends. The

administration of the functions of the said R.B.I. Nidhi are regulated by the Companies Act and rules. Due to misapplication of funds by interested persons, the administration of the funds of the said RBF Nidhi came to shambles and it resulted in postponement and delay in payment of the dues to the depositors. During the second week of December, 1999, the position became critical to satisfy the demands of the depositors. A case under Sections 420, 408 and 120B of I.P.C. was registered on a complaint by one of the depositors. The petitioners were arrested and subsequently, released on bail. The petitioners were also taken in custody to Hyderabad, Visakhapatnam and other places. The affairs of the R.B.F. Nidhi are looked after by a Special Officer appointed by the Company Law Board by Order, dated 18.11.1999. The Special Officer took over the administration from 20.12.1999. The managers of the branches of the RBF Nidhi at Chennai, Visakhapatnam and Hyderabad were left with cheques, signed by any one of the petitioners, when they were in office as Directors. These petitioners were removed from the Board of

Directors of R.B.F. Nidhi, by order dated 18.1.2000 by the Company Law Board. In the place of erstwhile directors, a new set of seven persons were appointed by the Company Law Board and they took over the administration.

3. The Company Law Board in its order, approved a scheme for repayment of the dues to the depositors and in respect of the cheques issued on behalf of the RBF Nidhi Limited signed by any of the Directors. As per the order of the Company Law Board, the deposits which had already matured would be treated as alive; the interest payable on such deposits would be frozen as at November, 1999 and the cheques issued by any of the petitioners would be treated as cancelled; the payment of dues at the rate of 10% on the matured de posits or Rs.2,000/- whichever is higher would be paid to the depositors on returning the cheques already issued.

4. The respondents herein filed complaints against the petitioners under Section 138 of the Negotiable Instruments Act, since the interest warrants issued by them were dishonoured. Interest warrants presented for collection was returned on 25.3.2000 for the reason that funds were not sufficient and the facility was withdrawn. The respondents stated to have issued a statutory notice on 30.3.2000 calling upon RBF Nidhi and the petitioners to pay the dues under the interest warrants. Statutory notice was received when the petitioners were in confinement and the petitioners were not aware of such notice. Hence, they could not send any reply.

5. The petitioners were removed from the Board of Directors and were made incapable of representing the RBF Nidhi, the petitioners have no personal liability in respect of the demand made by the respondents. The petitioners are not liable to be prosecuted. The V Metropolitan Magistrate had taken the complaint on file, issued summons to the petitioners and six others including the new Board of Directors. The petitioners appeared and pleaded not guilty of the charge. The complaint against the petitioners are not maintainable. Therefore, these O.Ps. have been filed to call for the records in the above C.Cs. and to quash the same.

4. Learned counsel appearing for the petitioners submitted that the

petitioners were Directors only till 18.1.2000. In September, 1999, the company appointed one A.R.Rao as Special Officer. On the petition filed before the Company Law Board in C.P.2 of 2000, by order dated 18.1.2000, the Board of Directors was superseded. The Company Law Board passed an order on 11th April, 2000, as follows:

" The erstwhile Board of Directors had issued cheques towards payment of interest/repayment of deposits without having any funds in the bank. The amount in respect of these cheques is reportedly of the order of about Rs.26 crores. All these cheques will be deemed to have been cancelled and the recipients of these cheques be asked to return these cheques at the time of making payment of the first instalment as ordered above. "

The counsel for petitioner further submitted that when the petitioners were Directors, Interest warrants were issued on an arrangement with State Bank of India, Gill Nagar, Chennai; such interest warrants were issued for payment between 21.12.1999 and 21.1.2000; these warrants were signed by two of the petitioners. These cheques were presented on 22.1.2000 and they were dishonoured; complaint was filed on 24 th April, 2000. Since these petitioners were removed as Directors on the date when the cheques in the name of the respondents were drawn, the petitioners were not Directors. The Company Law Board frozen the interest on deposits from 1.11.1999. The Company Law Board had all the powers of Court; since the Company Law Board cancelled all the cheques issued, the liability to pay interest has already ceased. Therefore, all the cheques issued subsequent to 18.1.2000 are not payable; therefore, it is not an existing liability; this amount is not payable. The private complaint was filed in April, 2000. Learned Magistrate has issued summons to the petitioners. Therefore, these petitioners have come forward with these petitions for the reasons stated above to quash the complaint.

5. Learned counsel for the petitioners further submitted that the Company Law Board has power to cancel the cheques. The order passed by the Company Law Board has not been challenged before any Court of Law. Therefore, it is binding on all the parties. The validity of the Company Law Board cannot be questioned by the Magistrate. Under Section 402(g) of the Companies Act, the Company Law Board has the power to provide for, "any other matter for which in the opinion of the Company Law Board, it is just and equitable that provision should be made." Therefore, the Company Law Board exercising the power conferred on it has passed order which in its opinion was just and equitable. Therefore, that order is binding on all the parties. This order was passed in a petition filed by the Central Government under Section 4 01 of the Company Law. Therefore, the learned counsel for the petitioner submitted, the cheques/interest warrants already issued were cancelled by the Company Law Board and therefore, there was no existing liability to pay any amount and therefore, the complaint has to be dismissed.

6. Learned counsel appearing for the respondent submitted that once a cheque has been issued and once it is dishonoured, the offence under Section 138 of the Negotiable Instruments Act has been committed and the offence continues till the amounts are paid. In this case, the offence was complete

on 22nd March, 2000. The Company Law Board passed the order only on 11th April, 2000. Therefore, the order of the Company Law Board will not affect the complaint already filed. In support of his argument, the counsel for the respondents relied upon a decision of the Supreme Court in Pankaj Mehra v. State of Maharashtra ((2000) 2 Supreme Court Cases 756), wherein the Supreme Court has held that,

" Section 138 of the Negotiable Instruments Act, no doubt, contemplates only when the cheque is drawn by a person 'for the discharge, in whole or in part, of any debt or other liability'. The explanation to Section 138 says that 'for the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability'. Therefore, the first limb of the contention is forceful that for the offence under Section 138, the cheque should have been drawn for discharging a legally enforceable debt or other liability. But the second limb of the contention is tenuous as the debt would not cease to be legally enforceable merely because somebody has filed a petition for winding up. "
Relying upon this decision, learned counsel for the respondents submitted that subsequent to the issue of cheque, even in cases where petition for winding up of the company is filed or if the person is adjudged an insolvent, the liability under Section 138 of the Negotiable Instruments Act, is not absolved. Therefore, once a cheque has been issued for the existing liability on the date when it was payable, any subsequent development will not absolve the liability. Therefore, the persons who gave the cheques cannot be absolved of their criminal liability; therefore, the complaint filed cannot be dismissed.

7. Learned counsel for the petitioners submitted that an order passed by the Company Law Board at the instance of the Central Government can be challenged only under Section 10 of the Companies Act. The order passed by the Company Law Board is binding, on all persons until it is set aside by the appellate forum. Inasmuch as that order has not been set aside by the appellate forum, viz., the High Court or the Supreme Court, that order of the Company Law Board is binding on the respondents; therefore, the complaints are liable to be dismissed. In support of the contention, learned counsel for the petitioners relied upon a decision in S.B.Shankar v. Amman Steel Corporation, Tiruchirapalli (2002 (1) CTC 227), wherein this Court quashed a complaint against a Director, since the cheques were issued when he was not a Director. In that case, the Director resigned from the company on 4.10.1999. Therefore, he ceased to be a Director from that date. But the cheques which were complained of were drawn between the period 3.2.2000 to 15.2.2000 during the period when they did not function as Directors. He also relied upon another decision in Shambu Kumar v. M/s. Raghvendra Steels Limited (2001 (4) CTC 399, where a complaint was filed against persons who retired from partnership on 30.9.1998 for the cheque drawn on 31.12.1998. In that circumstance, the complaint was quashed. Therefore, the counsel for the petitioners contended that the offence is committed after the completion of 15 days from the date of receipt of the notice demanding payment. In this case, on the date when the offence was committed, the petitioners were not Directors; Therefore, no complaint can be filed against them. Further, the Company Law Board has cancelled all the cheques drawn subsequent to 1.11.1999. Therefore, the

cheques issued to the petitioners were also cancelled and hence, there is no legally existing liability and therefore, the complaint is not maintainable.

8. The Company Law Board has passed orders only on 11.4.2000. The complaint in this case had been filed on 22nd March, 2000. Therefore, the order passed by the Company Law Board cannot have the effect of nullifying the consequences on the completed offence.

9. An order passed by the Company Law Board can only be prospective in its effect. Only Parliament or Legislative Assembly has the power to make retrospective laws or retroactive laws. The Company Law Board has no such power to make its orders retrospective or retroactive. Therefore, the Company Law Board's order cancelling all the cheques drawn after 1.11.1999 will not have any bearing on those cheques drawn till 11.4.2000. In M/s. Modi Cements Limited v. Kuchil Kumar Nandi, (A.I.R. 1998, S.C.1057), the Supreme Court has held, Once the cheque is issued by drawer, subsequent notice by the drawer to the drawee or to the bank on which it is drawn intimating stoppage of payment would not preclude action, under Section 138 of the Negotiable Instruments Act. Further, as held by the Supreme Court in the case 2000 (2) S.C.C. 756 referred to above, even the commencement of the proceedings of winding up of a company does not absolve the liability for payment and it will not have any effect on the applicability of Section 138 of the Negotiable Instruments Act. Once a cheque is issued and it is dishonoured and the demand has been made to pay the amount by notice, on the completion of notice period, the offence is complete.

10. According to the Supreme Court, the Companies Act does not prohibit enforcement of debt due from company. Even initiation of winding up proceedings will not have any effect of nullifying the offence under Section 138 of the Negotiable Instruments Act. The Supreme Court in BSI Limited v. Gift Holdings Private Limited ((2000) 2 S.C.C. 737), has held, the offence committed by the company under Section 138 of the Negotiable Instruments Act, 1881, is complete by reason of nonpayment of the amount covered by the cheque issued by it within 15 days contemplated in Clause (c) of proviso thereto, even if thereafter, B.I.F.R. passes an order under Sick Industrial Companies (Special Provisions) Act declaring the company to be a sick company, it would not bar institution of criminal complaint against the company and its directors under the Negotiable Instruments Act. The ban under Section 22(1) of the Sick Industrial Companies (Special Provisions) Act against maintainability of suit for recovery of money would not cover prosecution proceedings for offence under Section 138 of the Negotiable Instruments Act. The ambit of "suit" cannot be stretched to include prosecution. Further, in Kusum Ingots and Alloys Limited v. Pennar Peterson Securities Limited (A.I.R. 2000, S.C. 954), the Supreme Court held, the fact that the company has been declared sick before the expiry of period for payment of cheque amount does not save it or its directors from criminal prosecution. The only exception would be a direction under Section 22-A, where the B.I.F.R. issued a direction restraining the company or its directors not to dispose of its assets except with the consent of the Court. Section 141 of the Negotiable Instruments Act provides as follows:

" 141. Offences by companies: (1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. "

Therefore, the complaint can be filed against the company as well as every person who is in charge of conduct of the business of the company, at the time when the offence was committed. In the present case, the cheque was issued by the company and it has been signed by the then directors; the cheques/interest warrants presented for collection were returned on 25.3.2000 and thereafter, notice was issued demanding payment. The offence was committed only on completion of 15 days of notice of demand subsequent to the dishonour. In this case, the cheques were dated 21.12.1999 and 21.1.2000. Statutory notice was issued on 5.2.2000 and it was received on 11.2.2000. Therefore, the offence is committed on completion of 15 days from 11.2.2000, i.e., 26.2.2000. On that date, the petitioners before this Court were not directors. They have been removed by the Company Law Board by order dated 18.1.2000. Therefore, these persons were not directors on the date when the offence was committed.

11. Though a complaint against the company is maintainable, such a complaint is not maintainable against these petitioners who were not the directors on the date when the offence was committed. Therefore, the complaint in so far as it relates to these petitioners, is not maintainable. Therefore, in so far as these petitioners, the complaint is liable to be quashed. The complaint filed already as against those persons who are directors on the date of the commission of the offence, is maintainable.

12. Further, the Supreme Court has also held that even the order of adjudication of a person as an insolvent by competent Courts will not absolve the person who issued a cheque of his liability under Section 138 of the Negotiable Instruments Act. Therefore, in case of an offence under Section 138 of the Negotiable Instruments Act; the offenders cannot be absolved merely on the ground that some other legal consequences would emerge because of any order passed by Courts in any other proceedings.

13. Writing a letter intimating the drawee that the amount is not payable and therefore, he could not honour the cheque also would not absolve him from the liability under Section 138 of the Act; When giving instruction to the Bank to stop payment and intimating the same to the drawee cannot protect the drawer against a criminal prosecution under Section 138 of the Act, a fortiari a cheque issued cannot be cancelled by the drawer of the cheque; for the same reason, the Company Law Board also cannot cancel the cheques already issued.

14. Section 402 of the Companies Act contemplates issue of directions with reference to administration and management of the affairs of the company. It does not contemplate directions regarding debt due to third parties. The power under this section does not extend to deny the liabilities of the company or for staying the liability of the company. Cancellation of cheques

already issued is tantamount to denying the liability or staying the liability. Hence, the Company Law Board has no power under Section 402 (g) of the Act to cancel the cheques already issued for its liability.

15. When the offence under Section 138 of the Negotiable Instruments Act is committed, it gives rise to a cause of action for filing a criminal complaint; such a cause of action cannot be wiped off by the Company Law Board exercising the powers, under Sections 397 or 398 of the Companies Act; such complaints must reach its finality only as per the provisions of the Criminal Procedure Code.

16. Since the company is a distinct entity, any change in the board of directors does not affect the pending prosecution. It is well settled that for offence under Section 138 of the Negotiable Instruments Act, the company as well as the directors who manage the affairs of the company are to be prosecuted, the criminal complaint is therefore is maintainable only against those persons who are directors on the date of commission of the offence. In this case, the date of complaint under Section 138 of the Negotiable Instruments Act is anterior to the date of order of the Company Law Board. Hence, the order passed by the Company Law Board cannot have any effect on the complaint. But, the revision petitioners were removed as directors by order dated 18.1.2000; hence, no complaint can be filed against them for the offence committed subsequent to that date. Therefore, the criminal complaint in so far as these revision petitions are concerned cannot be maintained; they are liable to be quashed.

17. The prayer in these writ petitions is to call for the records and "quash the proceedings in C.C.No.3845 of 2000, 3846 of 2000, 3847 of 2000 and 3848 of 2000". Such a prayer cannot be granted. The proceedings in the said C.Cs. in so far as it relates to the revision petitioners is quashed.

18. Therefore, these petitions are allowed and the complaints are quashed in C.C.3845 to 3848 of 2000, in so far as they relates to these petitioners.

20-8-2002.

Index: Yes
Web Site: Yes
vs

To:
V Metropolitan Magistrate, Chennai.
through the Chief Metropolitan
Magistrate, Chennai.

A.K. RAJAN, J.

Common Order
in
Crl.O.P.No.19430 of 2000

&
Crl.O.P.Nos.22910
to
22912 of 2000